IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.4114 OF 2004

Vasant Damodar Dhamale,
Age: 68 years, Occ: Pensioner,
r/at 608, Ghorpade Peth,
Pune. .... Petitioner

- Versus -

Narayan Shivram Paigude,
Age: 68 years, Occ: Retired,
r/at 603, Ghorpade Peth,
Pune. .... Respondent

Shri Pramod J. Pawar for the Petitioner.

Sarvasri Kishore Walunju for Uday Warunjikar
for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: NOVEMBER 03, 2004

ORAL JUDGMENT:

1. Heard the learned Advocates for the parties. Perused the records.

2. The petitioner challenges the impugned judgment and decree on various grounds. It is not necessary to consider all those grounds and suffice to refer to only one ground, namely that the lower Appellate Court could not have disposed of the appeal on merit without affording opportunity to the petitioner of being heard in the matter. Undisputedly, the records disclose that

when the matter came up for hearing before the lower Appellate Court, the Advocate for the appellant in the appeal was not present and yet the lower Appellate Court proceeded to dispose of the matter on merits. Such a procedure is not known to law and the provisions of Order 41 of the Code of Civil Procedure are very clear in that regard. In case the appellant and his Advocate remained absent on the day fixed for hearing the appeal, the options available to the lower Appellate Court are that either to adjourn the matter or to dismiss the appeal for default but in no case the appeal can be disposed of on merits. Being so, the decision of the lower Appellate Court to proceed to dispose of the appeal without affording an opportunity to the appellant to be heard in the matter is clearly in violation of the statutory provisions, apart from being contrary to the basic principles of natural justice and on that count itself the impugned judgment and decree cannot be sustained and is liable to be set aside and the matter to be remanded to the lower Appellate Court with the direction to hear the appeal afresh, after giving opportunity to the parties of being heard in the matter and dispose of the same in accordance with the provisions of law.

3. The petition, therefore, succeeds on the above limited count. The impugned decree is hereby set aside

and the matter is remanded to the lower Appellate Court to dispose of the Civil Appeal No.277 of 2002 afresh, after hearing the parties and in accordance with the provisions of law. It is made clear that this Court has not expressed any opinion on any of the points sought to be raised in the appeal and all the points are kept open for the decision by the lower Appellate Court. The rule is made absolute in above terms with no order as to costs.